This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act) TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp. 1992). On December 9, 1991, a hearing was held in (city), Texas, with (hearing officer) presiding. He found claimant, respondent herein, who was injured on (date of injury), to have disability since June 15, 1991, and to be entitled to temporary income benefits (TIBs), with interest. Appellant asserts that respondent is not disabled but is unemployed because he was fired for insubordination and should be denied benefits.

DECISION

Finding that the decision, its findings, and conclusions are supported by sufficient evidence, we affirm.

I.

Of first consideration is respondent's challenge of the jurisdiction of this panel as to appellant's request for review. Citing Article 8308-6.33(4) and 8308-6.41, respondent says that the appeal was not filed within 15 days of receiving the hearing officer's decision. This challenge is rejected; the appeal was timely filed for the following reasons:

(1) Appellant states that the hearing officer's decision dated December 23, 1991 by the Division of Hearings of the Texas Workers' Compensation Commission, was received on December 31, 1991. There is no evidence provided that receipt was not on December 31, so that date is accepted as accurate.

(2) On December 31, 1991, Tex. W. C. Comm'n, TEX. ADMIN. CODE § 143.3, as amended, went into effect. It provided:

(c) A request made under this section shall be presumed to be timely filed or timely served if it is:

(1) mailed on or before the 15th day after the date of receipt of the hearing officer's decision, as provided in subsection (a) of this section; and

(2) received by the Commission or other party not later than the 20th day after the day of receipt of the hearing officer's decision. (emphasis added)

Evidence was provided by appellant that the appeal and service to respondent were placed into the U.S. Postal Service on January 10, 1992. January 10 is accepted as the date of mailing and is within 15 days of December 31, 1991.

(3) While January 20, 1992 was "the 20th day after the date of receipt" (December 31), that day was a holiday in this state. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.3 provides that if a last day of any time period is a holiday, the period is extended to include the next day.

(4) The appeal was received on January 21, 1992, and was timely.

II.

The parties agree that respondent was injured on (date of injury), when employed by (employer). Respondent worked previously for a smaller construction company that employer bought. He was a pipe fitter's helper for both companies, but on (date of injury), he was working as a rigger to tie I-beams together for a crane to move. The crane moved the I-beams with him still standing on them and he fell several feet onto more steel. He has a disc problem in his back now and may need surgery. His doctor placed him on light duty with a lifting restriction of no more than 30 pounds and no repetitive bending. This restriction was not removed. Employer placed him on light duty and paid him full wages until terminated. Light duty for at least two months prior to termination was to be spent in a narrow tool shed approximately 20 feet long. Respondent said he was given little to do in the tool shed since there was already an employee in the shed charged with distributing tools. The tool distributor and another, who was said to have witnessed the firing of respondent, have been fired also.

Respondent testified that since March 1991 he had questioned a $5.00 deduction from his paychecks. On June 14, 1991, he asked a supervisor, (RW), if he had an answer concerning the deduction. (RW acknowledged respondent had asked him about this before.) RW testified that respondent was upset at his response that the $5.00 item was an administrative charge for deducting child support; he said respondent wanted to know why he had not gotten an answer before. RW did not testify that obscenity was used, that shouting occurred, or that he was threatened in any way by respondent. RW characterized the exchange as insubordination because it happened in the presence of other employees. RW declared that this exchange, together with the report he got later in the day that respondent refused to sign an "exception" list kept for employees who arrive late, were the basis for respondent's being fired for insubordination. Carrier's attorney at one point rephrased the question to RW as follows:

Attorney for Carrier:

Q:"State for the record one more time what were your reasons for firing (DK) on the date of June 14, 1991?"

RW:"Insubordination."

Q:"And would you tell us exactly what constituted insubordination in your eyes?"

RW:"Disobeying timekeeper and becoming out of line with myself."

Attorney for Carrier: "Thank you. I have no further questions."

Respondent also testified that he was not late on June 14, 1991, that he was not told he was late by the gatekeeper, and that he was only asked to sign the "exception" list for late arrivals after he returned that afternoon from physical therapy. Respondent alleged that RW repeatedly indicated to him that he should quit his job and did not think he was injured. RW acknowledged that he knew that respondent was advised by his physician to walk around and that respondent may have gotten into trouble from "another superintendent" for going out of the shed during work hours. RW stated he only told

respondent to quit once; he told respondent that the only way for him to keep the $5.00 deduction out of his check was to quit.

The gatekeeper, (CW), said that respondent was late on June 14, 1991, was asked to sign the exception list, and refused to do so. She said that he had been late approximately three times before but had signed the exception list on those occasions after some argument.

There was some evidence that respondent worked after termination by helping an apartment manager move furniture. There was also evidence that his help in this regard was very limited, both in time and in effort expended, with no money paid for his services.

The only issue at hearing was whether respondent cannot obtain and retain employment at an equivalent wage because of the compensable injury or because of involuntary termination.

Appellant specifically objects to Finding of Fact 5 which reads:

> 5.On June 14, 1991, Claimant (DK) was terminated by the Employer (employer) Company at the whim and caprice of the Employer (employer) Company without good cause.

Stating that disability is defined by the statute as the "inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury," the appellant states that respondent's unemployment is caused by insubordination, not by the compensable injury. Involuntary termination that is based on good cause can be a factor, along with the continuing effect of the injury on the ability to obtain and retain employment, in considering whether temporary income benefits are due. Texas Workers' Compensation Commission Appeal No. 91027 (Docket No. WF-00005-91-CC-1) decided October 24, 1991. Also, *see* Gonzales v. TEIA, 772 S.W.2d 145 (Tex. App.-Corpus Christi 1989, writ denied).

The hearing officer heard the testimony of respondent, RW, and CW. He questioned RW as to whether he had received any instruction concerning insubordination and upon receiving a "no" answer, queried RW about his understanding of what constituted insubordination. The hearing officer decides the weight and credibility to give to any witness' testimony and to other evidence. Article 8308-6.34(e) of the 1989 Act.
The trier of fact is to judge credibility, assign weight and resolve conflicts and inconsistencies. Bullard v. Universal Underwriters Ins. Co., 609 S.W.2d 621 (Tex. App.-Amarillo 1980, no writ). The hearing officer may believe all, part, or none of any witness' testimony including RW's or the respondent's. Ashcraft v. United Supermarkets, Inc., 758 S.W.2d 375 (Tex. App.-Amarillo 1988, writ denied). The fact finder may draw reasonable inferences and deductions from the evidence. Harrison v. Harrison, 597 S.W.2d 477 (Tex. Civ. App.-Tyler 1980, writ ref'd n.r.e.). The evidence of record was sufficient to meet the burden of proof imposed on respondent as claimant and to support so much of the hearing officer's Finding of Fact 5 as states that termination of claimant by employer on June 14, 1991, was without good cause. Additional language in Finding of Fact 5 is not necessary to the decision and is disregarded. Texas Indemnity Insurance Company v. Staggs, 134 Tex. 318, 134 S.W.2d 1026 (1940).

Appellant also states that it was not allowed to produce evidence "of other reports of

(respondent's) insubordination, because the "hearing officer sustained claimant's objection of hearsay." A thorough review of the audio record reveals only one sustained objection to RW's testimony. It came in response to questions about respondent's view of his work. The first question addressed whether respondent was pleased with his light duty. The answer was, to the effect, no, there was no displeasure expressed to me. Another question asked whether there was any displeasure expressed to others. This question was objected to as calling for "insight," or a word to that effect, and the objection was sustained. The hearing officer is to rule on admissibility of evidence, Tex. W.C. Comm'n, TEX. ADMIN. CODE § 142.2(8), and conformity to legal rules of evidence is not necessary. Article 8308-6.34(e). While the objection may not have been sustainable, there is nothing in the record to show what the answer would have been had the question been allowed. In addition appellant made it clear in testimony quoted previously that RW's dismissal of respondent was based on two incidents of insubordination, both of which were fully developed in the evidence. At most this ruling was not reversible error since reversible error is not ordinarily shown in connection with rulings or questions of evidence unless the whole case turns on the particular evidence excluded. Atlantic Mutual Ins. Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.).

Finally appellant asserts that respondent should not be allowed to receive TIBs during the same period of time that he had received unemployment benefits. The 1989 Act does not specify that benefits may be adjusted because of benefits received from unemployment compensation. Texas Workers' Compensation Commission Appeal No. 91132 (Docket No. HO-A-086992-01-CC-HO42) decided February 14, 1991. Accordingly, no adjustment to TIBs will be made because of unemployment benefits paid. An adjustment may be made to unemployment compensation, however, because TEX. REV. CIV. STAT. ANN. art. 8308-5221b-3(e)(2) (Vernon Supp. 1992) states that such benefits will not be paid to a person in the same period of time that compensation under "The Workmen's Compensation Law of any state," is paid.

With sufficient evidence of record to support Finding of Fact 5 and no reversible error found in exclusion of evidence proffered by appellant, Conclusion of Law 5, 7, and 8 are sufficiently supported by the evidence and findings of fact. The decision is not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1952). We affirm.

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Joe Sebesta
Appeals Judge

CONCUR:

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Susan M. Kelley
Appeals Judge

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Robert W. Potts
Appeals Judge